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85-2070

No. _____

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Supreme Court, U.S.
FILED
MAY 19 1986
[redacted]
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAEL O'CONNOR, Petitioner

v.

EDWARD PRINS, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

_____

Michael O'Connor,
petitioner pro se
Box 4031,
Ann Arbor, MI 48106
(313) 769-0032

May 15, 1986

TWO QUESTIONS PRESENTED

Question A: Under these conditions: (1) a state constitution that has made public pension payments a timely "contractual obligation" of the state not to be "diminished or impaired thereby"; (2) retirants who secure at retirement a lifelong, vested, protected right to fixed, ministerial, subsistence payments, that lawfully can be divested only by the possible application of a condition subsequent; (3) respondent officials who have admitted (Admission 12, App.32) that petitioner's rights have never been divested: Given these, did respondents violate the Due Process Clause of the 14th Amendment when respondents, applying an established practice, under color of state law, interrupted totally for 8 years (1972-1980), and partly to date, the State's ministerial flow of subsistence to petitioner, for the stated

purpose of compelling the filing of an unauthorized form, but without a statutory charge or cause or cited condition subsequent, or claim then or later of the authority to interfere?

The courts below answered "No." The following decisions indicate a "Yes" answer. See unit VB, herein: Memphis Light, Gas & Water Division v. Craft, infra; Java v. California Department of Human Resources, infra; Logan v. Zimmerman Brush Co., infra; Amy v. Supervisors, infra.

Question B: Under conditions cited in "A" above: Is the 14th Amendment Due Process Clause violated when respondent officials apply under color of state law, a long-standing but unauthorized practice of unilaterally inserting into the statutory contract an unwritten, additional prerequisite on which the ministerial flow of transmittals is

conditioned; the pre-requisite being the filing by the retirant of a form for the illegal shifting of burdens, a form which demands that the reporting retirant supply personal financial information to be used by respondents in applying MCLA 38.219(2), a statutory forfeiture placed on retirants who do public teaching in excess of a stated amount anywhere in the nation; and moreover, is the demand to file a demand to waive the constitutional right to protest the abuse of state power?

The courts below answered, "No". The following decisions indicate a "Yes" answer: Winsett v. McGinness, infra, a 3d Circuit, en banc decision with a substantial progeny: Speiser v. Randall, infra; Philadelphia W. & B.R. Co. v. Howard, infra; Perry v. Sindermann, infra; United States v. Mississippi Power and Light Co., infra.

LIST OF PARTIES

The petitioner is Michael O'Connor, a retired professor of economics at Central Michigan University.

The 14 respondents, sued in their personal capacity, consist of the following: The first ten are past or present members of the Michigan Public School Employees Retirement Board. Edward Prins, C. Max Novak, Frederick P. Davenport, Mrs. Virginia Smith, Carl E. Kleimola, Wilton L. Henderson, Bernard W. Nelson, Mabel G. Matthews, Donna J. Fahlen, Richard L. Carney, Ed Pfau, representative on Board of ex-officio-Board member; Faith Bishop, same; Norvel Hansen, executive secretary, Retirement System; Mrs. Janet Harkness, employee, Retirement System.

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v.

EDWARD PRINS, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Michael O'Connor, respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 17, 1986, affirming the District Court's judgment and opinions.

I. OPINIONS BELOW

The opinion of the Court of Appeals,

which is not to be published, appears in the Appendix hereto, (App. 1,2). The opinions, orders and final judgment rendered by the District Court for the Eastern District of Michigan, Southern Division also appear in the Appendix hereto, (App. 4-20 inclusive).

II. JURISDICTION

The Court of Appeals was reached under 28 U.S.C. 1291. The decision and opinion of the Court of Appeals for the Sixth Circuit was entered on January 17, 1986. (App. 1,2). A timely petition for rehearing was denied on February 18, 1986 (App. 3), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

III. STATUTES

State's Contractual Obligation: 1963 Mich. Const. Art. IX, Sec. 24:

"The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

"Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities."

Interpretation of First Paragraph of 1963 Const. IX, 24

"What it is designed to do, is to say that when benefits come due, he's got a contractual right to receive them." Official Report, Constitutional Convention I, 770-774 (1961). (Emphasis added).

"...the firmly established right of public employees to receive pension payments as those payments become due." Kosa v. State Treasurer, 408 Mich. 356,371 (1980). (Emphasis added).

* * *

Michigan Public School Employees Retirement Act,

PA, 136, 1945, MCLA 38.201 et seq.

MCLA 38.201(g): "'Annuity' means annual payments for life derived from the accumulated contributions of a member. All annuities shall be paid in equal monthly installments."

MCLA 38.201(h): "'Pension' means annual payments for life derived from money provided by the state. All pensions shall be paid in equal monthly installments."

MCLA 38.222(2): "Once a retirant is in receipt of a retirement allowance from this retirement system, it may not be forfeited." See also MCLA 38.1367.

MCLA 38.219, 1972-1974 form MSA Rev. Vol. 15.893(19):

"If a person is receiving a retirement allowance or other benefit payable...on account of either or both age and years of personal services performed, and becomes employed in any tax supported school or other agency of a state in or territory of the United States, or in any employment covered by out of system service as defined in section 1 of this chapter, (1) in no case shall he be entitled to a new final average compensation or...and (2) his retirement allowance shall be reduced by the amount that his earnings in a calendar year exceed the amount he is permitted to earn without a reduction in benefits

under the federal social security act as from time to time amended, and (3) a retiree whose annual allowance is less than $2,500.00 may earn an additional $1,500.00 without any reduction in benefits. (Effective June 16, 1972 to July 31, 1974). Also see (App. 42-43)

National Scope Partly Revived:

New Retirement Act: PA 300, 1980, Public School Employees Retirement Act of 1979 (sic), MCLA 38.1301 et seq. Sec. 106 links the old to the new.

> MCLA 38.1361: "If a retirant... becomes employed in a tax supported school...of this state,...or with the state for which service credit is granted,..."(b) The retirant's retirement allowance shall be reduced by the amount that the earnings in a calendar year exceed the amount permitted without a reduction of benefits, under the social security act, Chapter 531,49 stat. 620." (Emphasis Added).

IV. STATEMENT OF THE CASE

After teaching in colleges and universities, 1927-1967, petitioner retired

from a post as Professor of Economics, Central Michigan University, and was paid a pension 1967 to 1972, under the Michigan Public School Employees Retirement Act, PA 1945, 136, Chap. 1; MCLA 38.201 et seq., MSA Rev Vol 15.893(1), et seq. This retirement system is compulsory, was contributory in the pre-1967 era, and is separately funded under 1963 Const. IX, 24.

Petitioner sued the Michigan Public School Employees Retirement Board (hereafter, Retirement Board) 1969-1977 concerning unlawful practices, including the way in which the 1969 form of MCLA 38.219(2) was enforced, but he never secured a judgment, pro or con, on MCLA 38.219(2). Procedural concessions were made but not to petitioner.

In 1972, petitioner refused to file the AES-1 form, a form asking for the annual income from teaching, (App.20).

This information was relied upon to enforce MCLA 38.219(2). From July 1972 in response to the refusal, petitioner's vested, contractual payments were blocked to compel the filing of the form, (App. 22). No statutory charge was made, no authority was claimed then or later.

The Retirement Board sponsored the 1974 form of MCLA 38.219(2) which dropped the main cause of the trouble, namely, the nationwide scope of the MCLA 38.219(2) forfeiture. The 1980 revision of the retirement act partly revived the national scope. (See Statutes).

On July 16, 1979, the present lawsuit was begun against 14 individuals in their personal capacity, not their official capacity. They all worked or had worked on or for the Retirement Board or System. The civil action arose under Section 1 of the Civil Rights Act of 1971, Stat. 13; under 42 U.S.C. 1983,

1985 (3), and 1988, to secure protection and redress for the attempted and actual deprivation by respondents under color of state law, of federal constitutional rights and immunities.

The action also arose under the 4th, 5th, 8th, and 14th Amendments; under the impairment clause, Art. I, Sec. 10, Clause 1; and the commerce clause, Art. I, Sec. 8, Clause 3. The jurisdiction of the District Court was based upon 28 U.S.C. Sections 1343, 1331, 2201 and 2202. Petitioner alleged that the matter in controversy exceeded the sum of $10,000 exclusive of interest and costs.

Petitioner's poor health has prevented the filing of an Amended Complaint and a Supplemental Complaint.

A timely demand for a jury trial was docketed on August 22, 1979.

Although Judge Churchill, in the 1980-1981 period, refused to issue a

preliminary injunction, he exerted pressure that forced respondents to stop, in late 1980, the current total blocking, and also to release a major part of the sums withheld over 8 years, releasing $25,778 out of some $31,000 blocked.

Respondents' covering letter (App. 23) gave no explanation of why the payments that had been blocked in 1972 and 1973 were not also released - probably about $5,000 is still withheld in 1986, depreciated to less than half the original value. In 1983, respondents' counsel spoke of urging respondents to release petitioner's money if petitioner would drop the lawsuit. (Transcript, October 19, 1983, pp.18,19).

The focus of this lawsuit is on the abuse of state power in the "as applied" area. The abuse has not lessened through the years despite the courts.

In 1982, the case was assigned to

Judge Joiner, and petitioner filed a motion (hereinafter Motion "G") for a ruling on the constitutionality of MCLA 38.219(2), on its face and as applied; injunctions and an accounting. Motion "G" prayers are at (App. 28).

The importance of Motion "G" results from the District Court declaring it to be a motion for summary judgment (App.6), in the Court's Memorandum Opinion and Order of January 18, 1983, which then denied every part of the motion that was discussed. This 1983 document provided the controlling elements in the grant of the court's summary judgment on August 14, 1984.

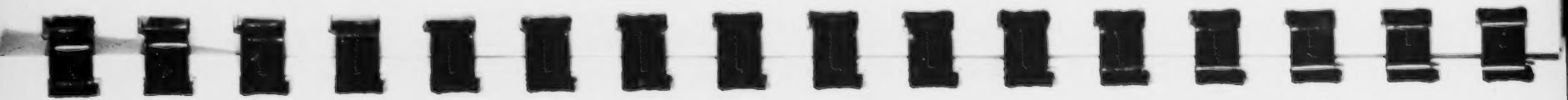
Motion "G" contained three arguments. The first was a simple prima facie case which can be outlined as follows:
(a) As the statutes quoted herein show, petitioner at his 1967 retirement, acquired a vested, protected, contrac-

tual, life-long right to the timely, monthly ministerial transmittal of a small but fixed subsistence payment, unless and until a cited condition subsequent in the contract was lawfully applied to divest petitioner's vested rights. As of retirement on July 1, 1967, petitioner's performance ended, and the State's performance began, under 1963 Const IX, 24. (b) Respondents were assigned purely ministerial duties unless and until they were able to produce the evidentiary facts required for the application of a condition subsequent that could divest the rights of petitioner. (c) As noted, petitioner's pension was blocked from July 1972, on. The years of blocking subsistence payments worked permanent and irrevocable deprivations. (d) But admission no. 12 (App.32) declared that there never had been any divestment of petitioner's

vested rights. (e) Hence respondent's blocking worked deprivations without citing a statutory charge, that is, a condition subsequent; without lawful divestment, and without 14th Amendment due process. (f) From 1972 on, respondents refused to perform their assigned ministerial duties, and have never justified their dereliction.

Respondents made no response to Motion "G" or to this prima facie case, and were not required to do so. The prima facie case was commended and then never again mentioned or answered or dealt with by the Courts below.

The second argument in Motion "G" dealt with the enforcing of MCLA 38.219 (2), the "as applied" procedures, namely: the unilateral insertion into the statutory contract of an unwritten prerequisite (the filing of the form) that must be met before payments would be



released, (App. 21); the use of the form to shift the burden of producing the evidence for applying a forfeiture; the failure to explain that the filing of the form involved a waiver of the 4th Amendment right to personal financial privacy; a waiver of the established right of an individual to reject an agency's unauthorized demand for any information; and a waiver of the 1st Amendment right to reject unauthorized demands that the retirant speak by filing an endorsement of the respondents' abuse of state power.

Also, for those who refused to waive, there existed the years of arbitrary destruction of the contract by blocking at the will and whim of respondents, blocking uncontrolled by the legislature or by any agency rule, and without a known limit on the duration or magnitude of the blockings.

As noted, respondents did not respond to Motion "G". The District Court's response to petitioner's challenge to "as applied" procedures was concentrated on a single page (App.11, 12), plus references (App.13, 19). The statement on (App. 13) is significant. In the Order of March 8, 1983, the District Court states that the order of January 18, 1983, upheld "the procedures adopted by the Retirement Board to enforce..." MCLA 38.219(2). On the word "adopted" see Admissions 14,20,21. (App.36,33,37).

The third argument of Motion "G" dealt with "facial" constitutionality, asserting: (a) That the 1972-74 form of MCLA 38.219(2) infringed on two fundamental liberties, but respondents had no compelling state interest. The District Court (App.9) answered that this "is part of the contract right of the plaintiff." Later, the Court of Appeals

cited as the purpose for MCLA 38.219(2) "that it tends to deter good teachers from retiring at their first opportunity in order to secure employment in another system." (App. 2). (b) That Motion "G" sees MCLA 38.219(2), 1972-74, as placing a double burden (App. 27) squarely and deliberately on interstate commerce without mention of Michigan. The District Court responded by denying the burden and by pointing to the lack of any discrimination "against out-of-state enterprise." (App. 10). (c) That Motion "G" claims that MCLA 38.219(2), 1972-74, in a contract of adhesion, conditions benefits on the forced waiver of the full, free exercise of two fundamental liberties. The District Court points out (App.//) that "The condition is part of the contract right of the plaintiff and does not cause a forfeiture after the fact."

In February 1983, the District Court required that one out of 35 interrogatories (No. 9), be answered by respondents. The answer to No. 9 stated (App. 26) that in 1974 respondents had stopped requiring that the AES-1 form be filed. This revealed for the first time a clear case of deliberate denial of equal protection, since respondents went right on totally blocking petitioner's pension till forced to stop in late 1980.

A few serious misstatements of fact appear in the District Court's opinions. One is toward the bottom of (App. 17). In fact, the MCLA 38.219(2) forfeiture was never applied to petitioner, as indicated on (App. 5, 26, App. 22), etc.

Response of the Courts Below

The District Court's view of both the "facial" and "as applied" aspects of the case is expressed in the penultimate paragraph of the August 14, 1984, Order

(App. 19). The essence of the District Court's ruling on the "as applied" aspect is to be found in the final sentence of (App. 12).

The basis of the ruling by the Court of Appeals is at (App. 2). It is an endorsement of the District Court's Opinions.

Neither court makes an attempt to provide evidentiary factual support for the "as applied" conclusions reached. Respondents never defended on the merits.

V. REASONS FOR GRANTING THE WRIT

A. The Job To Be Done

The basic function of this lawsuit is to push the State's agents toward abandoning the old paternalistic, social welfare policies to which administrators cling with both hands.

In the contractual, ministerial relationship created by 1963 Const. IX, 24, a score of years ago, people can

stand on their own two feet. But respondents do not want that. Many of these agents depend on unauthorized make-work jobs involving control of retirants. See (App. 27) for an example of make-work in the past. Now the old forces have largely shifted to new areas such as medical and dental services. But the nature of the problem remains constant.

In the different world of the 1930's, welfare grants were imperative to meet the special needs of those times. But today, the welfare attitude is a menace because it has come to be accepted and has been allowed to permeate the social order, including such areas as earned benefits.

A few leading states are trying to use contract to strike back at the spread of welfare thinking. Examples are California; New York; Pennsylvania, by the courts; and Michigan. The contracts in

these four states alone must amount to over a million people. The present Michigan retirement system (one of several) now has some 275,000 active members plus more than 60,000 retirants and beneficiaries.

Contract keeps knocking at the door but there are still few to open it. Not enough understanding exists among administrators and legislators. Retirants themselves have a great deal to learn. A contract limits the party to what was earned, without gifts. Contract is discipline, and heaven knows we need discipline.

The degree of administrative antagonism to contract, as contrasted to having the power to control 50,000 retirants, may be judged by the fact that three attempts were made to get essentially the same bill through the Michigan House, HB 6206 in 1978, HB 4733

in 1979, and HB 4877 in 1981-82. The bill aimed to create a new set of powers for this retirement system. The list of new powers began in this way: "Sec. 25. The Retirement Board shall have the following Powers and Duties: (A) to authorize or suspend the payment of a retirement allowance or benefit under this act. (B) to prepare..." etc. This power would have been unlimited, unqualified - in this bill.

Java v. California Department of Human Resources, supra, led the way in requiring due process when suspending contract pensions. We need to move in that direction. Retirants generally must achieve the status of persons with earned rights. Welfare recipients must become a company apart, necessary and essential, but entirely different and small. Welfare destroys freedom.

Once teachers as a whole understand

and accept the earned contract as a standard, the idea will spread. But the position taken by the courts has been and will be controlling. There are few things that the Supreme Court of the United States could sponsor that would help the nation more.

B. The Opinions of the Courts Below in the Present Case Are in Conflict with the Following Decisions

"AS APPLIED"

(a) Petitioner's Prima Facie Case

Memphis Light, Gas & Water Division v. Craft, 436 US 1,20(1978): Interrupted flows can create "a uniquely final deprivation."

Java v. California Department Human Resources, 317 F.Supp. 875,877(1970); aff'd. 402 US 121,133(1971): Due process is essential in suspending pensions in contract states.

Logan v. Zimmerman Brush Co , 455 US 422, 430 (1982): "the hallmark of property... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'."

Mt. Healthy City School District Board of Education v. Doyle, 429 US 274,287(1977). Respondents are required to respond to a prima facie case.

(b). Using the AES-1 Form to Shift the Burden.

Speiser v. Randall, 357 US 513, 528-529 (1958).

"...the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process..."

Philadelphia W. & B.R. Co. v. Howard, 13 (US, 46-56) How. 307,338 340 (1851). The proponent carries the burden.

(c) Adding a Pre-requisite for Contractual Transmittals

Winsett v. McGinness, 617 F.2d 996, 1007-1008, (3d Circ. 1980) (en banc) cert. den., 449 US 1098 (1981). In a case involving prison, liberty, and discretion, the court ruled that a public agency which, on its own, sets up an extra requirement to the obtaining of benefits, violates the due process clause. Perry v. Sindermann, 408 US 593,597 (1972). Government may not deny a benefit on a basis that infringes on constitutionally protected interests.

(d) Lack of Authorization is Decisive

United States v. Rumely, 345 US 41,42 1953). Authority is essential. United States v. Mississippi Power & Light Co., 638 F.2d at 907-908. Three tests for administrative searches: Authorization, probable cause, and some trace of agreement to search. Local Union No. 1055, IBEW v. Gulf Power Co., 146 F.2d 62,64 (5th Circ. 1944)

cert. den. The partial termination of a contract must be expressly authorized.

(e) Liability of Respondents

Amy v. Supervisors, 11 Wall. 136,138 (1870). A public officer is liable for injury wrought by refusal to perform an assigned ministerial act.

"FACIAL"

(a) Commerce

Pike v. Bruce Church, Inc., 397 US 137, 142 (1970). The burden on commerce should be weighed against the putative local benefits.

(b) Conditioning Benefits

Keyishian v. Board of Regents, 385 US 589,606 (1967). Conditioning state employment on the surrender of freedom. Schneckloth v. Bustamonte, 412 US 218, 219 (1973). Also: Johnson v. Zerbst, 304 US 458,464 (1938). The need for voluntary agreement in waiving funda-

mental rights.

C. The Decision Below, Approved by the Court of Appeals, Raises Questions

1. Simple Contradiction Is Not Enough: Due Process, Equal Protection

(a) Admitted: It was admitted, Admission No.12 (App. 32), for the purposes of petitioner's prima facie case, that respondents did deny due process when blocking.

Similarly, respondents admitted the invidious denials of equal protection to a class. See (App. 26) (App. 23) showing oppressive, unequal treatment.

(b) Denials: Nevertheless, the District Court denied that there had been violations of the Due Process and Equal Protection Clauses. There are no facts cited or challenged in support of these conclusions. (App. 12,19).

> "Nothing is clearer than this on a motion for summary judgment: if a

party has made an evidentiary showing warranting a favorable inference, contradiction cannot eliminate it." Morrissey v. Procter & Gamble Co., 379 F.2d 675,677 (1st Circ 1967).

2. Disputed Interpretations and Conclusions:

(a) When respondents' brief on appeal consists of quoting the entire District Court's Opinion; when that Opinion's conclusions state that there has been no denial of due process or equal protection; when the material facts are agreed upon by both petitioner and respondents; and petitioner contends that the facts show that due process and equal protection have been denied, then there is obviously a split as to the conclusions to be drawn from these agreed-upon facts.

(b) Summary judgments should be denied:

"...even where there is no dispute as to the evidentiary facts in the case, but only as to the conclusions to be drawn therefrom." Pierce v. Ford Motor Co., 190 F.2d 910,915 (4th Circ. 1951).

3. The Decisive Absence of Authority.

One reason that respondents never offered a defense on the merits is that respondents' enforcement procedures were never authorized by the legislature, not the blocking, not the AES-1 form, not the insertion of a pre-requisite to payment, not the demand for information, not the withholding of a retirant's vested, overdue money, not the selective release of payments long overdue.

The same absence of authorization is ignored when loose, general defenses are offered, such as: that a need exists for the AES-1 form in order to enforce MCLA 38.219(2) nationwide; or that administrators had a self-imposed duty to determine annually the "eligibility" of 50,000 retirants to receive the fixed, vested payment set at retirement.

Report forms, in particular must be authorized:

> "Agencies may not, without authority, require persons subject to their jurisdiction to file reports." Cooper, Frank State Administrative Law, I, 312.

On implied authority in Michigan see Admission Nos. 14,28 (App.33,41), and Mallchok v. Liquor Control Commission, 72 Mich. App. 341,347 (1976).

4. The "Eligibility" Defense

The Court of Appeals adopts the "eligibility" defense (App. 27) in their description of the AES-1 form, as follows:

> "Plaintiff also contests the requirements that he file periodically a form showing his eligibility for pension benefits without deductions." (App.2).

A few of the unlawful elements in this purely arbitrary "eligibility" theory are these: (a) The "eligibility" theory rejects the whole contractual concept of a life-long vested right established at retirement the minute that the retirant's

performance is complete, and rejects the basic protection of this vested right by the 14th Amendment. (b) The "eligibility" theory rejects the basic concept that due process divestiture, using a condition subsequent in the contract, must precede any invasion of vested protected rights - such as blocking, withholding, destroying timeliness, etc. These illegal invasions are treated as lawful in themselves.

The demands are equally radical: (c) The "eligibility" theory demands that 50,000 retirants file an unauthorized, unlawful, constitutional AES-1 form, accepting the illegal shift of the burden. (d) The theory unilaterally inserts into the contract an added prerequisite to payments, the filing of the form - a clear rejection of the State's contractual obligation, protected by federal and state law.

Both courts below have indicated considerable acceptance of the above-listed departures.

VI. CONCLUSIONS

A writ of certiorari to review the decision and the opinion of the Sixth Circuit on January 17, 1986, should issue because:

1. The Sixth Circuit Court of Appeals has sponsored the view that state officials may require a contracting retirant to satisfy the officials' unilaterally added prerequisite before she can get her vested pension payments; and that the officials may require this without working a denial of due process.

Such a ruling is contradicted by: Winsett v. McGinness, supra, 3d Circ.1980.

2. The Court of Appeals has departed from the accepted and usual course of judicial procedure by tacitly sanc-

tioning the District Court's failure to respond to petitioner's prima facie case; by sanctioning the District Court's ignoring the clear conflict between the two interpretations of the agreed-upon material facts; and by sanctioning the failure of the District Court to claim or cite or challenge any of these agreed-upon facts in supporting the conclusions reached by the court.

3. The opinions of the two courts below are in conflict with a series of decisions by this Court.

Respectfully submitted,

Michael O'Connor

Michael O'Connor,
Petitioner pro se
Box 4031, Ann Arbor,
Michigan 48106
(313) 769-0032

May 7, 1986

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APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH COURT

Michael O'Connor, petitioner pro se
Box 4031, Ann Arbor, MI 48106
(313) 769-0032

May 15, 1986

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAEL O'CONNOR, Petitioner

v.

EDWARD PRINS, et al, Respondents

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH COURT

APPENDIX

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I. DECISION, OPINION, ORDER OF 6TH CIRCUIT Court of Appeals: Decision, Opinion, dtd. 1/17/86

Filed Jan. 17, 1986 John P. Hehman, Clerk

Not recommended for full-text publication

No. 84-1676

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MICHAEL O'CONNOR, v. EDWARD PRINS, et.al.

Plaintiff Defendants

On appeal from the United States District Court for the Eastern District of Michigan. Before: LIVELY, Chief Judge, MERRITT and WELLFORD, Circuit Judges

PER CURIAM. Plaintiff, a former teacher, contests the constitutional validity of provisions of the Michigan teacher statute, Mich. Comp. Laws §38.219(2)

(1967) which effect a reduction in pension benefits when the teacher, after retirement, works in another system. Plaintiff also contests the requirement that he file periodically a form showing his eligibiiity for pension benefits without deduction. There is no showing that Michigan reduced "vested" retirement benefits after retirement. The reduction provisions in question were a part of Michigan law during the time plaintiff worked as a teacher and built up pension rights. Rather the attack is on the rationality of the Michigan rule (characterized as a "penalty") requiring pension reduction based on other income from active teaching during retirement. The reason given for the rule is that it tends to deter good teachers from retiring at their first opportunity in order to secure employment in another system. The reason given for the

application form is that it is needed in order to enforce the rule.

For the reasons stated by Judge Joiner in his two opinions (Joint Appendix, pp.135-140, 278-81)*, we affirm the judgment below holding that there is a rational basis for the Michigan Law.

Order Denying Rehearing, Dated 2/18/86

No. 84-1676

UNITED STATES COURT OF APPEALS

FOR THE SIXTH COURT

Filed Feb. 18, 1986 John P. Hehman, Clerk

ORDER DENYING PETITION FOR REHEARING

MICHAEL O'CONNOR, v. EDWARD PRINS, et.al.

Plaintiff Defendants

Before: LIVELY, Chief Judge; MERRITT and WELLFORD, Circuit Judges

Upon consideration of the petition for rehearing filed herein by the

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*See App. herein, pp.4-12, 15-20 incl.

the plaintiff, the court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT, Clerk

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

MICHAEL O'CONNOR, v. EDWARD PRINS, et.al.

Plaintiff Defendants

Civil Action No. 79-60018

HON. CHARLES W. JOINER

MEMORANDUM OPINION AND ORDER, 1/18/83

This is a civil rights action brought by the plaintiff pro per for violation of constitutional rights guaranteed by the fourth, fifth, eighth, and fourteenth

Amendments. The plaintiff is a retired professor from Central Michigan University whose pension benefits were suspended in 1972 because he refused to fill out a form provided by the defendants which required him to disclose all income earned from public school employment for the preceding year.

The action was originally filed in July of 1979, and the plaintiff filed a motion for preliminary injunction which was heard and denied in an order dated April 6, 1981. At the hearing, Judge Churchill prevailed upon the defendants to release the funds withheld and they complied, paying the plaintiff a sum in excess of $25,000.

The case has been delayed due to ill health of the plaintiff.

The present motion is brought by the plaintiff for (1) a ruling on the

constitutionality of Mich. Comp. Laws Ann. §38.219(2) (West 1967) on its face and as applied, and (2) an injunction and an accounting. The court will treat this motion as one for summary judgment.

The plaintiff's argument is that he has a vested right to his pension under the Michigan Constitution, Article IX, §24, and that the statute is unconstitutional as an impairment of that vested right. In the alternative, he argues that the enforcement provisions of the defendants are unconstitutional because they work to deprive him of a vested right without a hearing.

First of all, the statute in question says that the retirement allowance payable under the program will be reduced for retirees working in public education by the amount that the earnings from this employment exceed $1,500.00 in a calendar year. Mich. Comp. Laws Ann

§38.219(2) (West 1967). The statute has been amended to provide a reduction of benefits for public school employment in Michigan only, see Mich. Comp. Laws Ann §38.1361 (West Supp. 1981), but the version in effect when the plaintiff retired was §38.219 and the acts complained of took place under the authority of that section.

There are only two possible challenges to the statute as written and those would be that it violates either due process or equal protection. The plaintiff argues first that there is no rational basis for prohibiting public school employment throughout the entire United States. Presumably, this is an equal protection argument and the plaintiff is saying that there is no reason to distinguish between retirees based on whether or not they work in public school employment. The legislature may have been concerned

that a teacher would retire from employment in Michigan before taking another position teaching elsewhere in the United States. Without some restriction, the teacher would be able to collect retirement benefits and earn income at the same time.

The purpose of the statute is to provide for retirement systems for public school employees in Michigan, to operate the retirement fund, and to provide retirement allowances for employees. It is not unreasonable that the legislature would want to design the program so that a retired teacher would not receive salary and retirement benefits at the same time from public funds. The legislature is free to design a benefit program in this way, and this court is not prepared to say the scheme is irrational.

The second argument is that the scheme violates due process. In Michigan,

retirement benefits are a vested contract right. Mich. Const., Art. IX, §24 (1964). Consequently, the plaintiff's retirement benefits cannot be decreased once vested. Michigan has had a statute that provided for reduction of retirement benefits for amounts earned in public school employment since 1945. The constitutional provision conferring contract rights on retirees for their retirement benefits was effective in 1964. The statute reducing benefits for retirees who work in public school employment is part of the contract right of the plaintiff.

The plaintiff began working in Michigan in 1956. He retired in 1967. While there are no Michigan cases on point, other courts have held that retirement rights vest at retirement. See Brophy v. Employees Retirement System, 71 Cal. App. 2d 455, 162 P.2d 939 (1945). In Brophy,

the court upheld a similar statutory provision reducing benefits when the provision was enacted after the plaintiff began employment but before he retired. The present case is even more compelling because the statute was in effect when the plaintiff began working, when the constitutional provision was enacted, and when the plaintiff retired. Each time the statute has been amended, the restriction has been made less burdensome. Consequently, there has been no reduction in vested retirement benefits as prohibited by the Michigan Constitution.

The plaintiff also argues that the statute imposes an unreasonable burden on interstate commerce and that it conditions benefits upon surrender of fundamental liberties. Both of these arguments are without merit. The statute does not burden interstate commerce nor discriminate against out-of-state enterprise.

It also does not condition benefits upon surrender of fundamental rights. The condition is part of the contract right of the plaintiff and does not cause a forfeiture after the fact.

Therefore, the court finds that Mich. Comp. Laws Ann. §38.219(2) (West 1967) is not unconstitutional on its face.

In the alternative, the plaintiff argues that the statute is unconstitutional as applied. Basically, the plaintiff objects to having to fill out the AES-1 form. The Retirement Board which administers the program, requires retirants to fill out this form, disclosing whether they are employed in public education for the period in question, and if so, how much they earned from the employment. The plaintiff believes that the Board has no authority to require a form under the statute.

The statute says nothing about a form, but it gives the Board the power to promulgate rules and regulations with respect to retirement allowances. Mich. Comp. Laws Ann. §38.1325 (West Supp.1981) and §38.207 (West 1967); Bateham v. Michigan Public School Emp. Retirement Fund Board, 333 Mich. 264, 52 N.W.2d 693 (1952). Requiring the form is a relatively efficient way to administer the program and carry-out the provisions of the Act. The court can find nothing wrong with requiring the plaintiff to fill out the form and there is no violation of due process of first, fourth, or fifth amendment rights.

Therefore, the plaintiff's motion is denied. So ordered.

CHARLES W. JOINER, United States District Judge

Dated: Jan. 18, 1983, Ann Arbor, MI.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

MICHAEL O'CONNOR, v. EDWARD PRINS, et. al.

Plaintiff Defendants

Civil Action No. 79-60018

HON. CHARLES W. JOINER

ORDER (Docketed 3/18/83)

This matter was before the court on plaintiff's motion for a ruling on the constitutionality of Mich. Comp. Laws Ann. §38.219(2) as it existed in 1972-74 on its face and as applied and also for an injunction and an accounting. The matter was heard and resolved in an Order dated January 18, 1983. The statute was upheld as well as the procedures adopted by the Retirement Board to enforce its provisions. Consequently, the relief requested by the plaintiff was not granted.

The plaintiff has timely moved the court for a rehearing on this question. Motions for rehearing and reconsideration which present substantially the same issues ruled on by the court will not be granted under Local Rule 17(k). The plaintiff has failed to demonstrate a "palpable defect by which the Court and the parties have been misled." As to the plaintiff's prayer for an accounting, if the plaintiff will provide the Michigan Public School Employees' Retirement Board with the information as to whether or not he was employed in a tax supported school or public educational agency and the amounts, if any, earned in such employment for the period for which his retirement benefits are still being withheld, he will be paid whatever sums are owed. So ordered.

CHARLES W. JOINER, United States District Judge

Dated: MARCH 7, 1983, Ann Arbor, Michigan

Judgment and Order of 8/14/84

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil Action No. 79-60018 HON. CHARLES W. JOINER, MICHAEL O'CONNOR, Plaintiff vs. EDWARD PRINS, C. MAX NOVAK, FREDERICK P. DAVENPORT, MRS. VIRGINIA SMITH, CARL E. KLEIMOLA, WILTON L. HENDERSON, BERNARD E. NELSON, MABEL G. MATTHEWS, DONNA J. FAHLEN, RICHARD L. CARNEY, ED PFAU, FAITH BISHOP, NORVEL HANSEN, and MRS. JANET HARKNESS, Defendants.

JUDGMENT

The defendants' Motion for Summary Judgment came on for hearing before the court, the Honorable Charles W. Joiner presiding, and the issues having been duly heard and resolved in an order dated August 14, 1984.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits with prejudice.

ROBERT A. MOSSING, Clerk of Court

Approved as for Form: By _____

Deputy Clerk Dated: AUGUST 14, 1984

Ann Arbor, Michigan.

ORDER, Dated 8/14/84

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Civil Action No.79-60018 HON. CHARLES W. JOINER, MICHAEL O'CONNOR, Plaintiff vs. EDWARD PRINS, C. MAX NOVAK, FREDERICK P. DAVENPORT, MRS. VIRGINIA SMITH, CARL E. KLEIMOLA, WILTON L. HENDERSON, BERNARD E. NELSON, MABEL G. MATTHEWS, DONNA J. FAHLEN, RICHARD L. CARNEY, ED PFAU, FAITH BISHOP, NORVEL HANSEN, and MRS. JANET HARKNESS, Defendants.

ORDER

This case is before the court on the motions of all defendants for summary judgment. Plaintiff has requested that

this court rule on the motion on the basis of the papers submitted, without conducting an oral hearing, pursuant to Local Rule 17(j) of the United States District Court for the Eastern District of Michigan, and defendants have not objected to this request. Consequently, no hearing will be held. For the reasons stated herein, the motion is granted, and the complaint is dismissed with prejudice.

Plaintiff is an educator who taught between the years 1927 and 1967, when he retired from his position at Central Michigan University. The defendants are officials or employees of the Michigan Public School Employees Retirement Board. Upon his retirement in 1967, plaintiff became eligible for, and did receive pension benefits from the Board. Plaintiff's benefits were reduced in June of 1972, pursuant to M.C.L.A §38.219(2) (West 1967), which has since been amended.

In 1972, the statute provided that a person otherwise entitled to pension benefits under the Michigan Public School Employees Retirement Act, M.C.L.A. §38.201 et seq., would have their benefits reduced in a manner proportionate to the amount of income they earned as teachers in the public schools of other states. The complaint presents a constitutional challenge to §38.219(2). Plaintiff asserts that the statute created a "penalty" against full-time teaching after retiring from the Michigan Public Schools, and violated his rights to equal protection and due process under the fourteenth Amendment of the United States Constitution, and further violated Art. IX, Sec. 24 of the Michigan Constitution. The latter provision states that accrued financial benefits under a pension plan established by the

state "shall be a contractual obligation... which shall not be diminished or impaired."

In September of 1982, plaintiff filed a "Motion for Ruling on the Constitutionality of MCLA 38.219(2)," which was construed as a motion for summary judgment. On January 18, 1983, this court issued a memorandum opinion and order denying the motion, specifically concluding that the statute did not violate the equal protection and due process clauses of the fourteenth Amendment, either on its face or as applied in this case, and that it did not violate Art.IX, Sec. 24, of the Michigan Constitution.

Defendants have now moved for summary judgment, on the grounds that the opinion rendered in January of 1983, disposes of all of the legal issues in this case. Plaintiff has responded to this motion, asserting that there remains

genuine issues of material fact in this case, which prevent entry of summary judgment. Plaintiff fails to identify what those questions of fact are, however. Further, the facts in this case were largely uncontested. Reviewing the record, the court can find no outstanding factual or legal issues remaining in the case. The plaintiff has merely re-argued positions that he advanced in his prior motion for summary judgment. The court having concluded that those arguments were unavailing, it concludes that the defendants are entitled to summary judgment in this matter. SO ORDERED. CHARLES W. JOINER, UNITED STATES DISTRICT JUDGE Dated: AUGUST 14, 1984, Ann Arbor, Michigan.

IV. MATERIAL FACTUAL ITEMS

AES-1 FORM

32R22817 O'Connor, Michael

The reverse side of this card is to be completed, signed, and returned, even if you did not work during the calendar year 1971. To avoid delay in receiving future retirement checks, please return the completed card as soon as possible.

RETURN THIS CARD TO

Michigan Public School Employees Retirement System, Mason Bldg., 2nd Floor, So. Wing, Lansing, Michigan 48913.

ANNUAL EARNINGS STATEMENT

Please list your gross earnings before any deductions during the current calendar year from work in tax supported schools anywhere in the United States or its territorial possessions, or as an employee of the State of Michigan, or teaching dependants of military personnel overseas as an employee of the U.S. Government. If you did not work, write

the word "None" after the dollar sign. DO NOT report your retirement allowance. If you retired during the current calendar year, list only your earnings after retirement. Do not include the amount earned before your retirement date. My gross earnings as described above during the current calendar year were

$ _____.

Signature: _____

To date, we have not received the affidavit sent to you in January. To continue receiving your retirement checks, this affidavit must be completed and placed on file in this office. Michigan Public School Employees' Retirement Fund, Mason Bldg., 2nd Floor, South Wing, Lansing, Michigan 48913.

Respondent's 1972 Letter

STATE OF MICHIGAN, DEPARTMENT OF ADMINISTRATION, June 27, 1972.

Mr. Michael O'Connor, Fort Shelby Station, Box 1935, Detroit, Michigan 48231.

Dear Mr. O'Connor: We have previously sent the Annual Earnings Statement on three separate mailings and have not received one from you. Enclosed is another statement which must be signed by you and returned to this office with the total amount of your gross earnings as described on the statement for the 1971 calendar year. We will withhold further retirement checks until the statement is returned to us. Sincerely yours, Mrs. Janet Harkness, Insurance & Retirees' Accounts, Michigan Public School Employees' Retirement System.

Respondents' 1980 Letter

STATE OF MICHIGAN

DEPARTMENT OF MANAGEMENT AND BUDGET

July 24, 1980

Mr. Michael O'Connor, Box 7452, Ann Arbor, Michigan 48107. Dear Mr. O'Connor: In accordance with the recommendation of Assistant Attorney General, Mr. Felix League, Legal Counsel for the Michigan Public School Employees' Retirement System, the sum of your retirement checks that have been withheld since January 1, 1974, will be forwarded to you near the end of next month. Thereafter, you will be issued your regular monthly check. The August check will be in the amount of $25,778.07 and incorporates the postretirement adjustments that have been granted by the Legislature during the period your checks were withheld. Beginning in September, and thereafter, your monthly check will be in the amount of $347.82. If you have any questions, please contact me. Sincerely, Norvel A. Hansen, Executive Director.

1983 Letter Submitted by Respondents

STATE OF MICHIGAN

DEPARTMENT OF MANAGEMENT AND BUDGET

March 8, 1983

Mr. Felix E. League, Assistant Attorney General, 1840 State of Michigan Plaza, 1200 Sixth Avenue, Detroit, MI 48226.

Dear Mr. League: Your letter of February 28, 1983, has been referred to me for reply. The question posed in Interrogatory No.9 asks why in 1970 the MPSERS did not release payments due from 1972 on. It would seem that the plaintiff is asking why the system did not advance monies to him in 1970 that would be due to him in 1972, if he were to be alive on that date and for the remaining lifetime. The plaintiff made no such request in 1970; however, had he done so, the request would have been denied as the statute did not then, and does not

now, provide for a "lump sum" payout option. If the plaintiff meant "September 1980" and not "September 1970" in Interrogatory No.9, following is my response: Section 17 (sic) of Act 136 of Public Acts of 1945, as amended, provided for a reduction in retirement benefits if the retirant had earnings as an employee in a public school beyond the legal limit. To enforce the above citation, the system distributed "earnings affidavits" to be completed and returned by the retirant certifying whether there was earnings in public schools and the respective amounts. The plaintiff refused to complete and return the "earnings affidavit" for the calendar year 1971, and, as a result, his allowance was suspended in July, 1972. In 1974, the statute was amended and the "earnings affidavits" were no longer required in order to enforce the pro-

vision. In August, 1980, the plaintiff was reinstated retroactively to January 1974, and is currently receiving a monthly benefit from this system. The system cannot determine eligibility for the suspended allowance between July 1972, and December 1973, until the Plaintiff certifies whether he had earnings in the public schools for the period January 1971, through December 1973, and the respective amounts. Sincerely, Thomas W. Schaefer, Assistant Exec. Director.

1973 Admission of Doubling Forfeiture

(from INFORMATION bulletin, 1973 ed.,p.14)

WORK AFTER RETIREMENT AFFECTING RETIREMENT ALLOWANCE

All retirees, whose earnings exceed the amount permitted after retirement, will forfeit from their retirement allowances the full gross amount earned over the limit. A retiree could

lose up to 24 months' retirement allowance by working full-time for one school year, because his excess earnings apply in two separate calendar years. Regardless of how much is earned in any one calendar year, no more than 12 months' allowance may be lost in any one calendar year.

PRAYER FOR RELIEF (MOTION "G")

WHEREFORE, plaintiff asks the Court to:

1. Declare that defendants' monthly interferences with the State's performance of its ministerial duty to make timely transmittals to plaintiff, violate the 14th Amendment; and declare that all further interference with the State's transmittals to plaintiff are enjoined, by preliminary and permanent injunction, unless each interference complies with the Due Process Clause. (See brief, paras. 1-13; 39-44)

2. Enjoin defendants, by a preliminary and a permanent injunction, from denying due process by further use of a monthly penalty when, as here, the penalty's nature, size and duration are unguided, uncontrolled and unlimited by any statute or promulgated rule, and are set and altered solely by defendants at will. (See motion, brief, paras. 10;22-38;39-44).

3. Declare that MCLA 38.219(2), in its 1972-74 form, is unconstitutional on its face, under the 14th Amendment, and that the further enforcement of the provision is therefore enjoined.
(See brief, paras. 14-21; 39-44)

4. Declare that MCLA 38.219(2) as applied by defendants to retirants is unconstitutional under the 1st, 4th, 5th and 14th Amendments, and that further use by defendants of the three major component procedures in defendants'

scheme of en masse "enforcement" of MCLA 38.219(2) are enjoined by a preliminary and by a permanent injunction.
(See brief, paras. 22-38, 39-44)

5. Enjoin defendants by a preliminary and a permanent injunction from placing any further monthly penalties on a retirant's exercise of his 1st Amendment liberty to make silent protest against defendants' illegal demands that plaintiff speak by filing an unlawful form required of all retirants.
(See brief, paras. 31-34, 39-44)

6. Grant an order requiring defendant fiduciaries to render an accounting with respect to those payments overdue and payable to plaintiff which have been, or are being, withheld from plaintiff in violation of the 14th Amendment. The accounting would cover those matters listed in the Motion's Sec. V, paras. 45-47.

7. Grant such other and further relief as equity may permit or require, or which to the Court seems fitting and just.

ADMISSIONS BY RESPONDENTS (Numbers 10-30)

10. About one-third of retirants under the Retirement Act have been living outside of Michigan, at any given point in time since 1967.

Responding to admissions request No.10, defendants do not have statistical data available at this time to enable them to respond to paragraph 10.

11. Plaintiff's vested rights to the timely transmittal of monthly retirement payments may not be forfeited, according to MCLA 28.221(5) (sic) of the Retirement Act; his retirement payments may not be attached or garnished according to MCLA 38.225 of the Retirement Act and may not be diminished or impaired without due process according to both the 14th

Amendment and 1963 Const. IX, 24.

Responding to admissions request No.11, defendants admit the retirement benefits may not be attached or garnisheed.

12. Plaintiff's right to a retirement allowance vested at his retirement in 1967. Defendants have never claimed that Plaintiff's right has become divested in whole or in part.

Responding to admissions request No.12, defendants admit that plaintiff has not been divested of his vested right to retirement benefits, as determined in accordance with applicable statutes.

13. MCLA 38.219(2) is the only express condition subsequent for retirants who retired on the basis of age and service.

Responding to admissions request No.13, defendants deny the truth of the allegations set forth in paragraph 13 of the request.

14. The retirement board has never attempted to promulgate a rule dealing with the enforcement of MCLA 38.219.

Responding to admissions request No.14, defendants admit that the Board has not promulgated a rule dealing with the enforcement of MCLA 38.219.

15. The Judgment of the Wayne County Circuit Court dated July 25, 1972, in the case of Michael O'Connor v. The Michigan School Employees' Retirement Board, L.C. No. 128021 (cited, Defendants' Answer, paras. 6, pp.2-3, and 1(d), p.2) does not mention MCLA 38.219 nor refer to its enforcement, nor mention the constitutionality of the provision itself or of the way it is enforced.

Responding to admission request No.15, defendants state that Wayne County Circuit Court did not rule on the constitutionality of MCLA 38.219 for the reason that the Court determined that

the issue was improperly raised.

16. Defendants have sent only two letters to Plaintiff dealing with more than 8 years of withholdings, one on June 27, 1972, announcing the first interference with transmittals; and a second one July 24, 1980, accouncing a partial release of Plaintiff's overdue payments in September, 1980. Neither letter cited any authority for the action taken by the Defendants, either to retain or to release selectively. The citation of authority is fundamental to due process.

Responding to admissions request No.16, defendants deny the truth of the allegation set forth in paragraph 16 and state that they have corresponded, in one way or another, with the Plaintiff many times since 1972.

17. Defendants have a fiduciary trustee relationship to retirants, and the

Retirement Act is a remedial statute, requiring interpretation that favors the achievement of its basic objectives; namely the payment of pensions.

Responding to admissions request No.17, defendants admit a fiduciary relationship to the Plaintiff.

18. After January 1, 1974, Defendants sent no further annual AES-1 forms to Plaintiff.

Responding to admissions request No.18, defendants admit that form AES-1 was not sent to the Plaintiff after January 1, 1974.

19. In 1978, HB 6206 which did not pass the House, attempted to create for the retirement board, the express power that Plaintiff has pointed out Defendants do not possess and have never possessed. namely: The unqualified power to "... suspend the payment of the retirement

allowance..." 1963 Const. IX, 24 and the 14th Amendment would both reject this disregard of due process. (See Exhibit C, Plaintiff's Complaint). Nevertheless, in 1979-80 essentially the identical bill, now called HB 4733, again failed to pass the House in 1980. The sponsors of these two bills obviously agree that the retirement board does not have unqualified power to suspend.

Responding to admissions request No.19, defendants deny that HB 6206 (1978) and HB 4733 (1980) failed to pass the state legislature for the reasons stated by the Plaintiff in paragraph 19 of the request.

20. Defendant's policy that each retirant must file an annual AES-1 form was never formally adopted by the Retirement Board on a particular date; never phrased in official terms; never published in one fixed, unchanging

statement. The policy has had no official shape, so the policy could not be implied from a statute.

Responding to admissions request No.20, defendants admit that the requirement that retirants file an annual AES-1 form was not the subject of a policy determination by the Board; but requirement that such a form be filed was procedural in nature.

21. Defendants' policy of forcing a retirant to file an AES-1 form by threatening and by actually carrying out the threat to interfere with the timely transmittal of payments to the retirant was never formally adopted by the Retirement Board on a particular date; never phrased in official terms; never published in one fixed, unchanging statement. Since the policy had no single shape, it could not be implied from a statute.

Responding to admissions request No.21, defendants deny Plaintiff's allegation as to the nature or intent of the requirement that form AES-1 be filed again states that the requirement for such filing was procedural.

22. Neither Defendant nor the Retirement Board has ever possessed authority to punish a retirant for contempt or contumacy and such authority is normally restricted in Michigan to courts of record.

Responding to admissions request No.22, defendants admit that the Board possess no authority to "punish" retirants.

23. The State's use of punishment for a period of indefinite, unstated duration in order to force a person to do an act he has refused to do, is the exercise of the power to punish for contumacy or contempt.

Responding to admissions request No.23,

defendants deny the truth of the allegation set forth on paragraph 23 of Plaintiff's request.

24. The legislature could not delegate power to the Retirement Board to set up unilaterally and promulgate a new pre-condition to payment, namely, the filing of a form, because the legislature itself lacks authority to add to an already executed contract a new pre-condition to the State's total performance, namely, payment.

Responding to admissions request No.24, the request does not have sufficient clarity to permit a response.

25. An administrative agency has only those powers that have been conferred upon it by the Legislature, and the agency may not expand upon those powers.

Responding to admissions request No.25, defendants state that administrative agencies are possessed of those powers

conferred upon it by the Legislature, and the agency may not expand upon those powers.

26. A retirant has the right to be free from unauthorized actions by the State which impair his vested protected property rights.

Responding to admissions request No.26, defendants admit that a retirant has a right to be free from unauthorized interference with his vested rights.

27. In Michigan, a penalty must be expressly created by a statute, it cannot be implied, it cannot be extended by implication.

Responding to admissions request No.27, defendants admit that administrative penalties must be set forth statutorally, but deny that the reduction of retirement benefit entitlement through the application of MCLA 38.219 constitutes the imposition of a penalty.

28. In Michigan, to be valid, rules must be promulgated.

Responding to admissions request No.28, defendants admit that administrative rules must be properly promulgated in order to become valid or effective.

29. The Retirement Board is without authority to compel compliance with its orders by any mandate of the Retirement Board; it must rely on the Courts to enforce orders.

Responding to admissions request No.29, defendants deny same and state that the Board does have authority to require compliance with the statutes being administered by it.

30. When a statute provides for inflicting a forfeiture or exacting a penalty, the burden of showing the existence of the facts warranting such action rests on the agency that seeks to impose the penalty.

Responding to admissions request No.30, defendants admit that wherever an administrative agency imposes a penalty or forfeiture it is encumbent upon the agency to justify its actions; however, in this case, Defendants deny that their actions amounted to the imposition of a penalty or forfeiture.

MCLA 38.219 Verbatim in 1972

MCLA 38.219, 1972-1974

MSA Rev Vol. 15.893(19):

"If a person is receiving a retirement allowance or other benefit under the provisions of this chapter, as amended, or Chapter 1 of Act. No.184 of the Public Acts of 1937, as amended, or Chapter 1 of Act No. 56 of the Public Acts of 1941, on account of either or both age and years of personal services performed, and becomes employed in any tax supported school or other public educational agency of a state in or territory of the United States, or in any employment covered by out-of-system service as defined in Section 1 of this Chapter, (1) in no case shall he be entitled to a new final average compensation or additional

contributions to this retirement system except for the social security contributions provided under this Chapter, and (2) his retirement allowance shall be reduced by the amount that his earnings in a calendar year exceed the amount he is permitted to earn without a reduction in benefits under the federal social security act as from time to time amended, and (3) a retiree whose annual allowance is less than $2,500.00 may earn an additional $1,500.00 without any reduction in benefits. (Effective June 16, 1972 to July 16 1974.)"